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Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR UNION RESPONDENTS IN OPPOSITION

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February 28, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

QUESTION PRESENTED

Whether a party that has consummated a transaction pursuant to Interstate Commerce Commission approval and authorization as provided in 49 U.S.C. 11343 and 11344 is exempt under 49 U.S.C. 11341(a) from provisions of collective bargaining agreements that may impede implementation of certain operational aspects of the consummated transaction?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 880 F.2d 562. The amendatory order of the court of appeals of September 29, 1989, is unreported. (Pet. App. 27a-28a.) The opinion of the Interstate Commerce Commission in No. 89-1027 (Pet. App. 29a-46a) is

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[1] "Pet. App." references are to the appendix to the petition in No. 89-1027 unless otherwise indicated.

unreported, but the Commission's opinion in No. 89-1028 (No. 89-1028, Pet. App. 33a-52a) is reported at 4 I.C.C. 2d 641.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1989. Petitions for rehearing were filed by CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company and were denied on September 29, 1989. (Pet. App. 49a-50a.) The petitions for a writ of certiorari in both cases were filed on December 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Statutes Involved

Section 11343(a) of the Interstate Commerce Act ("Act"), 49 U.S.C. 11343(a), lists six specifically described financial transactions that the Interstate Commerce Commission ("ICC" or "Commission") is authorized to approve. Section 11344, 49 U.S.C. 11344, requires ICC approval of such transactions upon application by a qualified applicant when the Commission "finds the transaction is consistent with the public interest", 49 U.S.C. 11344(c). Section 11343(a) of the Act, 49 U.S.C. 11343(a), prohibits carriers by railroad from engaging in such transactions absent ICC approval.

Section 11347 of the Act, 49 U.S.C. 11347, requires the Commission to impose "a fair arrangement" for the protection of the interests of employees who may be affected by the Commission's order of approval and specifies certain minimum protections which the Commission must impose as part of the "fair arrangement". The minimum statutory protections were developed in *New York Dock Ry.-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd*, 609 F.2d 83 (2nd Cir. 1979). These conditions require a ninety-day written notice of any changes

which may affect employees and, before any such changes can occur, a voluntary or arbitrated implementing agreement must be reached with the representatives of affected employees on the selection of forces to perform the consolidated work and the assignment of employees to those forces. (Pet. App. 3a; No. 89-1028, Pet. App. 79a.) The minimum statutory conditions also require preservation of "rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise . . . unless changed by future collective bargaining agreements." (Pet. App. 3a-4a.)

Section 11341(a), the focus of the court of appeals' decision, provides in part:

> A carrier . . . participating in that [approved] transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property and exercise control or franchises through the transaction.

B. Proceedings Below

1. *No. 89-1027*

Some four and one-half years after the Commission had approved and the applicants had consummated the control of the Norfolk and Western Railway Company ("N&W") and the Southern Railway Company ("Southern") by NWS Enterprises, Inc. (now "Norfolk Southern" or "NS"), a holding company, respondent American Train Dispatchers Association ("ATDA") was informed that N&W and Southern intended "to coordinate certain [N&W] work performed in the System Operations Center . . . in Roanoke, Virginia into the [Southern] Control Center in Atlanta, Georgia". (Pet. App. 6a-7a.)

The carriers sought to negotiate an implementing agreement under section 4 of the *New York Dock* conditions under which the N&W supervisors represented by ATDA in Roanoke would be "given consideration" for employment as superintendents in Atlanta with the Southern Railroad. On the Southern, however, these employees were considered management, not covered by a collective bargaining agreement and not represented by a union. Negotiations for an implementing agreement failed because of ATDA's position that (1) the carriers' proposal was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under Railway Labor Act ("RLA") section 2 Fourth, 45 U.S.C. 152 Fourth; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the collective bargaining agreement ("CBA") with N&W. (Pet. App. 7a.) The carriers requested the appointment of an arbitrator by the National Mediation Board and after hearing, the three person arbitration panel concluded by a divided vote that (1) it had the power to abrogate any CBA or RLA provision that impeded implementation of the ICC-approved merger of the operations of the N&W and the Southern; (2) the transfer of locomotive power functions, though not specifically considered by the ICC in approving NS control of the railroad some four and a half years earlier, was part of the control transaction; and (3) because application of the N&W collective bargaining agreement to any superintendents at the Southern facility would somehow impede the transfer, the transferred employees could not retain their rights under that collective bargaining agreement. (Pet. App. 7a.)

By a divided vote, the Commission affirmed the arbitration panel. (Pet. App. 29a-46a.) The Commission expressed the "view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." (Pet. App. 33a.) The Commission held that, in accordance with that view, the panel had correctly found that Article I, section 2 of *New York Dock* which "requires that collective bargaining rights be preserved in a section 11343 transaction" (Pet. App. 33a) must give way to the "compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, . . . [which takes] precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." (Pet. App. 35a.) The Commission finally concluded that the "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." (Pet. App. 37a.)[2]

2. ***No. 89-1028***

In 1980, the ICC approved an application by CSX Corporation, Inc., a newly-formed holding company, to acquire control of two other holding companies: (1) the Chessie System, Inc., the principle railroad subsidiaries of which were the Chesapeake & Ohio Railroad Company ("C&O") and the Baltimore & Ohio Railroad Company ("B&O"); and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad ("Seaboard") (later to become CSX Transportation, Inc. or "CSX"). The ICC imposed upon those railroads the standard formula of employee-protective conditions as required by section 11347 of the Act, 49 U.S.C. 11347. (Pet. App. 3a.)

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[2] The dissent of Commissioner Lamboley (Pet. App. 42a-46a) concludes *inter alia* that "no tribunal established under the ICA may claim authority to terminate representation rights" but, while both the arbitration panel and the majority of the Commission acknowledged their inability to "pre-empt RLA representation rights," each proceeded "to effectively terminate those rights". (Pet. App. 46a.)

Six years later CSX, invoking section 4 of the *New York Dock* conditions, notified respondent Brotherhood of Railway Carmen ("Carmen") that it intended to close its freight yard repair shop at Waycoss, Georgia and transfer the work performed there to the C&O repair shop at Raceland, Kentucky. Carmen attempted on behalf of affected employees to negotiate an agreement governing the changes that the Waycross-Raceland consolidation would require. (Pet. App. 4a.)

Relations between CSX and the unions representing many of its employees were governed by an agreement known as the "Orange Book" which had been negotiated in connection with a 1967 merger that created Seaboard from the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company. The Orange Book provided that the resulting carrier would employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment period." In consideration for that job protection, the Orange Book gave the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [*i.e.* Seaboard] System . . . ." (Pet. App. 4a.)

Negotiations between CSX and Carmen failed due to disagreements as to (1) whether displaced Waycross employees would retain their Orange Book right to lifetime income; and (2) whether (a) the Waycross-Raceland consolidation would result in a change in working conditions, and, if so, (b) CSX would be required to comply with the terms of section 6 of the RLA, 45 U.S.C. 156, and thus, to negotiate an agreement before effecting the proposed change. Arbitration was invoked under the *New York Dock* conditions and the matter came before an arbitration panel with the Carmen participating under

protest. (Pet. App. 5a.) The arbitration panel agreed with the Carmen that the Orange Book prohibited the proposed transfer of work and employees, but held that as a "quasi-judicial extension of the ICC" it was authorized to abrogate provisions of the CBA and to relieve CSX of any requirement of the RLA that stood in the way of an operational change, such as a shop transfer. (Pet. App. 5a.) The majority of the arbitration panel then held that it would abrogate the Orange Book's prohibition on the transfer of work, but not on the transfer of employees outside the old Seaboard System, and also would exempt CSX from RLA requirements insofar as they might require the carrier to negotiate an agreement effecting a change in the Orange Book with respect to the work transfer. (Pet. App. 5a-6a.)

The Commission, by a divided vote, upheld the panel majority's conclusions in all but its decision not to abrogate the Orange Book prohibition on a transfer of employees. (No. 89-1028, Pet. App. 33a-52a.) The Commission affirmed the panel majority's finding that "the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation" and concluded that the panel was correct in finding that "it was empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement." (No. 89-1028, Pet. App. 43a.) The Commission, however, overturned the decision of the arbitration panel to the extent that it held "that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland" because imposition "of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." (*Id.* 45a.)[3]

[3] In his dissent, Commissioner Lamboley concluded that the majority opinion "represents a continuing effort to modify Commission precedent and runs contrary to existing judicial precedent" in its "attempts to establish the proposition that *any* conflict, regardless of origin or degree, is an impediment preempted by ICA provisions." (*Id.* 49a.)

3. *The Court of Appeals' Decision*

Separate petitions for review of the ICC decisions in the two cases were filed with the court of appeals which considered the two cases together and remanded them to the Commission. (Pet. App. 1a-26a.) The court held that section 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees. (Pet. App. 26a.) The court concluded that "the ICC's position finds no support in the language of the statute". (Pet. App. 12a.) The court also thought it unlikely "that Congress would grant the ICC a power with so much potential to destabilize the railroad industry . . . without so much as a word to that effect in the statute itself." (Pet. App. 13a.) The court reviewed the legislative history of section 11341(a) and concluded that there was no evidence whatever that the Congress "either broadened that provision so as to reach 'all legal obstacles' to an ICC-approved transaction, or acted more specifically to bring 'contracts' or 'collective bargaining agreements' within the reach of the statute." (Pet. App. 18a-19a.)

The court declined to address the issue of whether section 11341(a) might operate to override the provisions of the Railway Labor Act (Pet. App. 19a) for two reasons: first, because there has been no finding by any tribunal that such an override was "necessary" to effect the approved transaction (Pet. App. 19a-23a) and, second, because in "light of our holding that § 11341(a) does not empower the ICC to override a CBA, it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA." (Pet. App. 23a-25a.)

The court declined "to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion, in the *Dispatchers*' case, that § 4 of the *New York Dock* conditions give the arbitration committee the 'absolute right'

to effect the transfer of employees and to override any contrary provisions of the CBA." (Pet. App. 25a.) The court did not address those issues because "the ICC has not argued the first theory to us at all" and "its exclusivity argument before the Supreme Court [in *P&LE R. Co. v. RLEA*, 491 U.S. ——, 109 S.Ct. 2584 (1989)] would appear also to encompass both the § 11347 theory and the § 4 rationale advanced in the decisions here under review." (*Id.* 25a-26a.) The court concluded that it would not "consider as a basis for affirming the decision a ground upon which the agency places no reliance on appeal" and closed with the admonition that "in any event, we think it best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position." (*Id.* 26a.) The court remanded the cases with respect to the ICC's RLA holding "in order that the agency may determine whether further proceedings are necessary." (*Id.* 26a.)[4]

Following remand, the ICC determined that further hearings were necessary "in order to permit the Commission to properly assess the role of the Commission and its labor conditions in railroad consolidations." (*CSX Corporation-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Decision, Finance Docket No. 28905 (Sub-No. 22) (August 31, 1989) [hereinafter, ICC Dec. F.D. No. 28905 (Sub-No. 22)].) The Commission stated that it was "reopening these proceedings so that

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[4] Just over two weeks after the court of appeals issued its opinion in these cases, the ICC published its decision in *Brandywine Valley R. Co.—Purchase—Etc.*, 5 I.C.C.2d 764 (1989) in which it observed at page 772 n.5:

> In that [*Carmen*] case, the court ruled only that the exemptive provisions of 49 U.S.C. § 11341(a) did not authorize the Commission to relieve the parties to a collective bargaining agreement from their obligations under that contract (slip op. at 12-19). *We do not dispute the validity of this limited holding by the Court.* (Emphasis supplied.)

we may address and explain in detail our views on the issues specifically remanded; *i.e.*, whether the provisions of 49 U.S.C. 11341(a) operate to override the provisions of the Railway Labor Act (RLA) as well as on the general issues raised in these proceedings, particularly the impact of our approval of a transaction under 49 U.S.C. 11343, *et seq.* and imposition of our standard labor conditions upon the parties' rights and remedies under the RLA and with respect to existing collective bargaining agreements." (*Ibid.*) The Commission went on to seek "further comment by the parties to these proceedings as well as any other interested parties" because "of the importance of the legal issues involved and our intention to conduct a comprehensive examination of our authority under 49 U.S.C. 11341, 11343 and 11347, etc. and the labor conditions we have customarily imposed in approving railroad consolidations." (*Ibid.*) The ICC also filed a "limited" petition with the court of appeals seeking a rehearing of that court's ruling, but advised the court of its decision to reopen the proceedings and "to promptly issue a comprehensive decision on remand addressing issues we believe the court directed us to reconsider and those left open for resolution in further proceedings" and requested "that the court refrain from ruling on our petition for rehearing until we have issued our decision on remand." (*Ibid.*)

The court of appeals, on September 29, 1989, issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand". Pet. App. 54a.) The court also amended its decision to remand only the "records", thereby retaining jurisdiction over the case. (*Id.* at 28a.) Comments were filed by all interested parties as requested by the Commission; and, following its rejection of objections of the rail unions, including ATDA and Carmen, to its order as exceeding the limits of the remand order, the ICC held oral argument on January 4, 1990. The Commission held an open voting conference on February 9, 1990, stating

that a written decision on remand would be issued in approximately one month from that date.

ARGUMENT

Petitioners herein challenge the holding of the court of appeals that section 11341(a) does not authorize the ICC to override the provisions of a collective bargaining agreement. (No. 89-1027 Petition, 10-24; No. 89-1028 Petition, 8-19.) Union respondents ATDA and Carmen respectfully submit that the petitions for a writ of certiorari are premature and should not be granted because the court of appeals has retained jurisdiction and because of the current proceedings before the Commission. Additionally, the writs have not met the "imperative public importance" criterion set forth in Rule 11 of the Rules of this Court.

The court of appeals remanded the record to the Commission to determine whether any RLA procedures remained to be completed in light of its holding that the collective bargaining agreements could not be overridden. (Pet. App. 24a, 25a.) Upon receipt of the remand order, the Commission determined to explore what legal means it might have for superceding the employees' rights under the Railway Labor Act, if such rights would impede implementation of a consummated merger. The Commission may develop a position satisfactory to petitioners and legally acceptable to the court of appeals.

In any event, the court of appeals expressly declined to address the Commission's arguments based upon section 11347 of the Act and section 4 of the *New York Dock* conditions; nor did it decide whether section 11341(a) may exempt carriers from the requirements of the RLA. Consequently, the Commission's decision on remand may not be affected by the current decision of the court of appeals in this case. When the Commission's written decision is published, it will be presented to the court of appeals which will have an opportunity to review it and

determine whether the Commission was legally correct in its affirmance of the ATDA arbitration panel and its partial affirmance and partial reversal of the Carmen arbitration panel.

We respectfully submit that the court of appeals should be permitted to revisit these matters in a setting in which the Commission will have been able to utilize all legal theories that all interested parties could present to it. If, following a review of that decision by the court of appeals, further review by this Court is deemed warranted, the case may then present an appropriate vehicle for resolution of the disputed issues.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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